

## REMARKS

Claims 10, 26, 27, 30, 62, 78, 79, and 82 have been cancelled. Claims 1, 25, 28, 31, 53, 77, 80, 83, and 87 have been amended. New claims 91-97 have been added. Claims 1, 25, 28, 31, 53, 77, 80, 83, and 87-97 are pending in the instant application.

It is respectfully submitted that the present amendment presents no new issues or new matter and places this case in condition for allowance.

### I. The Restriction Requirement

The Office Action imposed restriction and election requirements. Specifically, Applicants were requested to elect one of twenty-two designated groups under 35 U.S.C. § 121.

As provided therein, Applicants elected with traverse the claims of Group IV. Claims 1, 10, 25, 27, 28, 30, 31 and 90 read on the elected subject matter. The basis of the traverse was that, while the inventions of Groups IV and XV are distinct, they are not independent of each other since they both involve the promoter variant of SEQ ID NO: 5. The Office found Applicants' argument persuasive, and Groups IV and XV were rejoined. Claims 1, 10, 25, 27, 28, 30, 31, 53, 62, 77, 79, 80, 82, 83, and 87-90 read on the rejoined subject matter. Applicants were also required to elect a species of a hybrid promoter as it relates to the sequences and elected a hybrid between SEQ ID NO: 5 and SEQ ID NO: 3 (or subsequences thereof) with traverse. Applicants affirm the election of Groups IV and XV and a hybrid between SEQ ID NO: 5 and SEQ ID NO: 3 (or subsequences thereof), but reserve the right to file continuing applications directed to the non-elected subject matter.

### II. Specification

The Office Action stated that the instant application fails to comply with the requirements of 37 CFR 1.821 through 1.825 because Figures 1A and 1B contain a nucleotide sequence that need a sequence identifier.

Applicants have amended the specification on page 2, lines 29-30, to include the sequence identifier SEQ ID NO: 1 for Figures 1A and 1B.

For the foregoing reason, Applicants submit that the amended specification complies with the requirements of 37 CFR 1.821 through 1.825.

### III. Claim Objections

The Office Action objected to claims 1, 25, 28, 31, 53, 77, 80, and 83 because the claims

contain nonelected sequences. Appropriate correction was requested.

Applicants have amended the claims to delete the non-elected subject matter.

For the foregoing reason, Applicants submit that the amended claims overcome the objections and respectfully request reconsideration and withdrawal of the objections.

#### **IV. The Rejection of Claim 77 under 35 U.S.C. § 112, Second Paragraph**

Claim 77 stands rejected under 35 U.S.C. § 112, second paragraph, as being indefinite on the ground that the limitation "the first nucleic acid sequence" in lines 1 and 2 has insufficient antecedent basis.

Claim 77 has been amended to recite in part "a nucleic acid sequence encoding a biological substance".

For the foregoing reason, Applicants submit that the rejection is overcome under 35 U.S.C. § 112 and respectfully request reconsideration and withdrawal of the rejection.

#### **V. The Rejection of Claims 1, 27, 28, 53, 79, 80, 87, 88, 89, and 90 under 35 U.S.C. § 102(e)**

Claims 1, 27, 28, 53, 79, 80, 87, 88, 89, and 90 stand rejected under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 6,361,973. The Office Action stated:

US 6,361,973 (specifically abstract, columns 1, 2, 10 and 11 and SEQ ID NO: 1) teach a method for producing a biological substance comprising cultivating a fungal host cell that comprises a first nucleic acid sequence encoding a polypeptide operably linked to a second nucleic acid sequence comprising a promoter, SEQ ID NO: 1, subsequences thereof, and hybrid promoters, thereof, and isolating the polypeptide. Also taught is the promoter, SEQ ID NO: 1, subsequences thereof, and hybrid promoters thereof, a nucleic acid construct encoding the polypeptide operably linked to a second nucleic acid sequence comprising a promoter, SEQ ID NO: 1, subsequences thereof, and hybrid promoters, thereof, a vector comprising the nucleic acid construct, and a host cell comprising the nucleic acid construct. Lastly, a method for producing a polypeptide comprising a recombinant cell comprising a promoter variant, an exon, and/or a splice donor site operably linked to a second exon encoding the polypeptide and recovering the polypeptide, is taught.

SEQ ID NO: 1 is not 100% identical to SEQ ID NO: 5, but fits the definition of being a subsequence. Subsequence is defined by Applicant in the specification as being at least about 1200 nucleotides. SEQ ID NO: 1 has a match of 1089 nucleotides to SEQ ID NO: 5, which is a less than 10% difference, so is therefore fits the definition of a subsequence that is at least about 1200 nucleotides. SEQ ID NO: 1 also is not 100% identical to SEQ ID NO: 3, but fits the definition of being a subsequence. Subsequence is defined by Applicant as being at least about 1200 nucleotides. SEQ ID NO: 1 has a match of 1089 nucleotides to SEQ ID NO: 3, which is a less than 10% difference, so is therefore fits the definition of a subsequence that is at least about 1200 nucleotides. Portions SEQ ID NO: 3 and 5 are present in SEQ ID NO:1, therefore SEQ ID NO: 1 also fits the definition of a hybrid promoter.

This rejection is respectfully traversed.

Under the standard required for anticipation under 35 U.S.C. § 102, the cited prior art reference is required to disclose every element of the claimed invention. *Lewmar Marine Inc. v. Barient Inc.*, 3 USPQ2d 1766 (Fed. Cir. 1987).

U.S. Patent No. 6,361,973 discloses the promoter sequence of a *Fusarium venenatum* glucoamylase gene. However, U.S. Patent No. 6,361,973 does not disclose a subsequence of SEQ ID NO: 5 comprising at least one copy of the sequence CGGCGTAATTTTCGGCC (SEQ ID NO: 70). Also, U.S. Patent No. 6,361,973 does not disclose a hybrid promoter comprising a portion of SEQ ID NO: 3 and a portion of SEQ ID NO: 5, wherein at least one of the portions comprises at least one copy of the sequence CGGCGTAATTTTCGGCC (SEQ ID NO: 70).

For the foregoing reasons, Applicants submit that the rejection is overcome under 35 U.S.C. § 102(e) and respectfully request reconsideration and withdrawal of the rejection.

#### VI. Conclusion

In view of the above, it is respectfully submitted that all claims are in condition for allowance. Early action to that end is respectfully requested. The Examiner is hereby invited to contact the undersigned by telephone if there are any questions concerning this amendment or application.

Respectfully submitted,

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